IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

JOHN EMMINGHAM, Plaintiff, v. PER MICHAEL SELTZER, MICHAEL HATHAWAY, Counselor, Oregon State Penitentiary Minimum (OSPM), THOMAS WRIGHT, Facility Manager, OSPM, CARLA TUPOU, Assistant Superintendent, R. OGDEN, Security Manager, OSCI, GREGORY HUNTER, Library Coordinator, OSCI, Defendants.	)	No. CV-08-6329-HU FINDINGS & RECOMMENDATION

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HUBEL, Magistrate Judge:

Plaintiff John Emmingham, currently an inmate of the Oregon Department of Corrections (ODOC), housed at the Snake River Correctional Institution (SRCI), brings this 42 U.S.C. § 1983 action against Per Michael Seltzer, an individual, and several employees of the ODOC (ODOC Defendants). Plaintiff's claims are described more fully below. The allegations are generally based on the ODOC employees ordering plaintiff to stop sending mail to Seltzer, the order having been issued in response to a complaint by Seltzer that he had received threatening and unwanted mail from plaintiff.

Seltzer moves for summary judgment on the claims against him. The ODOC Defendants separately move for summary judgment on the claims against them.[1] For the reasons explained below, I recommend that Seltzer's motion be granted, and that the ODOC Defendants' motion be granted in part and denied in part.

BACKGROUND

In April 2006, after plaintiff was released from prison, Seltzer invited plaintiff to live as a guest in Seltzer's home. Seltzer Declr. at ¶ 6. Selzter spoke to plaintiff's probation

[1] Judge Mosman previously dismissed defendant Ogden from the case in an August 18, 2009 Order (docket #15).

officer and parents and established certain rules for plaintiff to live with him, including attending twelve-step meetings, finding a twelve-step sponsor, and participating in "constructive means to living." Id. Plaintiff, however, was apparently arrested and prosecuted for burglarizing Seltzer's neighbor's home and stealing opiate narcotics. Id. at ¶¶ 6, 7. He was sent back to prison. Id. at ¶ 7.

Plaintiff then sent mail to Seltzer from prison. Id. at ¶ 2. Seltzer describes the mail as being offensive, and as containing personal attacks, untrue accusations, and threats against him. Id. In response, Seltzer contacted officials at the prison to request that plaintiff be restricted from contacting Seltzer. Id.

Plaintiff denies that mail sent to Seltzer was offensive, and denies that it contained personal attacks, untrue accusations, or threats. Pltf's Declr. in Opp. to Seltzer's SJ Mtn at ¶ 3.

Seltzer is not employed by any governmental agency, be it local, state, or federal, including the Oregon State Police or the ODOC. Seltzer's Declr. at ¶¶ 1, 4. He contacted the ODOC employees about the mail as a private citizen with no connection to the State of Oregon. Id. at ¶ 2. Seltzer's only interaction with the ODOC Defendants in this case was via telephone when he called to inquire about what he considered to be harassment of him by plaintiff. Id. at ¶ 23. He has never met any of the ODOC Defendants face to face, he is not friends with any of them, and is not related to any of them. Id. at ¶¶ 21, 22, 24.

According to the ODOC Defendants, plaintiff was housed at the Oregon State Penitentiary Minimum facility (OSPM), from February 20, 2008, until June 25, 2008. Hathaway Declr. at ¶ 3; Attchmt 1

to Hathaway Declr. (plaintiff's housing history). On March 5, 2008, Hathaway, an OSPM correctional counselor, issued an Outgoing Mail Restriction to plaintiff, indicating that mail to Seltzer was unwanted because it involved harassment. Hathaway Declr. at ¶ 4 (noting mail restriction issued because plaintiff was sending unwanted, harassing mail to Seltzer); Attchmt 2 to Hathaway Declr. (outgoing mail restriction form). See Or. Admin. R. §§ (OAR) 291-131-0021 (rule allowing ODOC to prohibit an inmate from sending unwanted mail to a particular person). Hathaway states that Seltzer contacted the facility and provided sufficient information to justify issuance of the outgoing mail restriction. Hathaway Declr. at § 8.

According to Wright, who was the OSPM Facility Manager at the time, Wright knew that plaintiff was trying to sue Seltzer, plaintiff's former roommate, and that Seltzer had written to plaintiff saying he did not want any contact with plaintiff once plaintiff was paroled. Wright Declr. at ¶ 7. At some point, Wright received a call from Seltzer asking what ODOC could do about a threatening letter Setlzer received from plaintiff. Id.

The timing of Wright's conversation with Seltzer is unclear. Hathaway's declaration suggests that it was after Hathaway issued the outgoing mail restriction and that Seltzer's call to Wright was prompted by Seltzer continuing to receive mail from plaintiff. Hathaway Declr. at ¶ 6. Wright told Seltzer to send Wright a letter and he would issue a mail restriction notice to plaintiff preventing plaintiff from writing to Seltzer. Wright Declr. at ¶ 7. However, plaintiff was transferred from OSPM before Wright could issue an outgoing mail restriction. Id. at ¶ 7.

On June 25, 2008, Wright authorized plaintiff's transfer from OSPM to the Oregon State Correctional Institution (OSCI). Id. at ¶ 8; Attchmt 2 to Wright Declr. According to Wright, plaintiff complained to him about mental health issues and requested to see a Behavioral Health Services (BHS) specialist regarding his medications for anxiety. Id. at ¶ 8. Wright states that the medication involved is a narcotic and OSPM medical staff cannot prescribe or issue this type of medication. Id. OSPM does not have full-time medical staff or BHS providers. Id. Wright authorized plaintiff's transfer to OSCI so he could access medical staff and BHS staff, including meeting with a BHS specialist to renew and receive anxiety medication. Id.

Additionally, Wright explains, OSCI is a pre-release facility. Id. at ¶ 9. At the time of his transfer, plaintiff had less than four years to his release. Id. OSCI also has a law library where plaintiff could pursue his legal work. Id. at ¶ 10. Transferring plaintiff to OSP was not an option because of a conflict with another person at that facility. Id.

On September 4, 2008, after plaintiff's transfer to OSCI, Wendy Hatfield, Executive Assistant to the OSCI Superintendent, and OSCI's Public Information Officer, issued an outgoing mail restriction to plaintiff because he was sending unwanted, harassing mail to Seltzer. Hatfield Declr. at ¶ 4. She states that Seltzer contacted the ODOC and "provided sufficient information to justify the Outgoing Mail Restriction." Id. at ¶ 8.

STANDARDS

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a

matter of law. Fed. R. Civ. P. 56(c). The moving party bears the initial responsibility of informing the court of the basis of its motion, and identifying those portions of "'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)).

"If the moving party meets its initial burden of showing 'the absence of a material and triable issue of fact,' 'the burden then moves to the opposing party, who must present significant probative evidence tending to support its claim or defense.'" Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991) (quoting Richards v. Neilsen Freight Lines, 810 F.2d 898, 902 (9th Cir. 1987)). The nonmoving party must go beyond the pleadings and designate facts showing an issue for trial. Celotex, 477 U.S. at 322-23.

The substantive law governing a claim determines whether a fact is material. T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). All reasonable doubts as to the existence of a genuine issue of fact must be resolved against the moving party. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986). The court should view inferences drawn from the facts in the light most favorable to the nonmoving party. T.W. Elec. Serv., 809 F.2d at 630-31.

If the factual context makes the nonmoving party's claim as to the existence of a material issue of fact implausible, that party must come forward with more persuasive evidence to support his claim than would otherwise be necessary. Id.; In re Agricultural

Research and Tech. Group, 916 F.2d 528, 534 (9th Cir. 1990); California Architectural Bldg. Prod., Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1468 (9th Cir. 1987).

DISCUSSION

I. Plaintiff's Claims

In his Amended Complaint, plaintiff brings several claims, some of which were subsequently dismissed in an August 18, 2009 Order by Judge Mosman. Although a bit unclear and repetitive, plaintiff appears to have brought the following claims in his Amended Complaint:

A. 42 U.S.C. § 1983 Claims Against Seltzer

(1) a violation of plaintiff's First Amendment rights based on Seltzer having forced the ODOC Defendants to prevent plaintiff from sending mail to Seltzer, including service of a summons and complaint in a state tort case;

(2) a violation of plaintiff's Sixth Amendment right of access to the courts based on the same facts;

(3) a violation of plaintiff's Fourteenth Amendment right to send legal mail and to litigate;

(4) a violation of plaintiff's Fifth Amendment rights to equal protection; and

(5) claims of retaliation based on the First Amendment, Sixth Amendment, Fourteenth Amendment, and Sixth Amendment.

Am. Compl. at ¶¶ 172-189.

B. 42 U.S.C. § 1985(3) Conspiracy Claims Against Seltzer

Plaintiff alleges that Seltzer conspired with the ODOC Defendants to violate various Fifth Amendment rights in violation of section 1985(3). Id. at ¶¶ 190-198.

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C. State Law Violations as Basis for Federal Constitutional Claims Against Seltzer

Plaintiff alleges that Seltzer violated various rights under Oregon statutes and the Oregon Constitution which in turn, constitute a violation of various federal constitutional rights including the Fourteenth, Sixth, and First Amendments. He also alleges that Seltzer abused the relevant OAR, which in turn he contends constitutes a violation of plaintiff's Fourteenth Amendment due process rights by causing the ODOC Defendants to prevent plaintiff from sending mail. Id. at ¶¶ 177, 199-204.

D. Supplemental State Claims Against Seltzer

Plaintiff brings supplemental state claims of negligent infliction of emotional distress, invasion of privacy, and negligence.

E. Claims Against the ODOC Defendants

With some slight variation, plaintiff brings the same claims brought against Seltzer, against the ODOC Defendants.

F. Judge Mosman's August 18, 2009 Order (Docket #15)

The August 18, 2009 Order was issued in regard to the Amended Complaint. Judge Mosman first noted that in a prior Order, issued December 5, 2008)docket #6), he dismissed plaintiff's original Complaint which had raised claims alleging that Seltzer had denied plaintiff his constitutional right of access to the courts, and had violated his due process rights. Aug. 18, 2009 Ord. at pp. 1-2; Dec. 5, 2008 Ord. at pp. 2-3. In the August 18, 2009 Order, Judge Mosman noted that the access to courts claims had been previously dismissed in his prior order because the constitutional right of access to the courts does not extend to filing a state tort action.

Aug. 18, 2009 Ord. at p. 1 (citing Simmons v. Sacramento County Superior Ct., 318 F.3d 1156, 1160 (9th Cir. 2003)). Thus, to the extent plaintiff had re-alleged the access to court claims in his Amended Complaint, they were dismissed. Id. at pp. 1-2.

Next, Judge Mosman dismissed all of plaintiff's equal protection claims due to plaintiff's failure to allege that any of the defendants acted with an intent or purpose to discriminate against plaintiff based upon his membership in a protected class. Id. at p. 2. Finally, he dismissed all claims against named defendant "R. Ogden," an ODOC Assistant Superintendent, for failure to allege how Ogden violated plaintiff's rights. Id.

II. Seltzer's Motion for Summary Judgment

Seltzer argues that he is entitled to summary judgment on the section 1983 claims because he was not a "state actor." I agree.

To prevail in a section 1983 claim, a plaintiff must show the deprivation of a right secured by the Constitution and that the defendant "act[ed] under color of state law." West v. Atkins, 487 U.S. 42, 48 (1988); 42 U.S.C. § 1983. A section 1983 claim may be brought against a private party when that party "is a willful participant in joint action with the State or its agents." Kirtley v. Rainey, 326 F.3d 1088, 1092 (9th Cir. 2003) (internal quotation omitted).

As explained in a 2001 case, "state action may be found if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001) (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351

(1974)).

While technically the "under color of state law" requirement for section 1983 claims is distinct from "state action" required for Fourteenth Amendment claims, "the two inquiries are closely related." Johnson v. Knowles, 113 F.3d 1114, 1118 (9th Cir. 1997); see also George v. Pacific-CSC Work Furlough, 91 F.3d 1227, 1229 (9th Cir. 1996) ("In § 1983 actions, 'color of state law' is synonymous with state action.").

Here, the undisputed evidence in the record is that Seltzer, acting as a private citizen, notified ODOC employees of mail he received from plaintiff that Seltzer considered harassing and threatening. He requested that ODOC employees prevent plaintiff from sending him mail. Apparently, he made this request more than once. No evidence suggests that Seltzer had any other role in issuing the mail restriction. Seltzer's actions are not enough to show that he acted jointly with the state, or in any other way acted under color of state law. Notably, while plaintiff's Amended Complaint alleges that Seltzer conspired with the ODOC Defendants to issue the outgoing mail restriction, plaintiff fails to submit any facts opposing Seltzer's motion for summary judgment suggesting that Seltzer did anything more than report his complaint to the ODOC employees.

While private persons may act "under color of law" for section 1983 purposes by jointly engaging with state officials in the challenged action, the Ninth Circuit has previously held that merely complaining to the police does not convert a private party into a state actor. Collins v. Womancare, 878 F.2d 1145, 1155 (9th Cir. 1989) (noting also that execution by a private party of a

sworn complaint which forms the basis of an arrest is not enough to convert the private party's acts into state action).

The undisputed facts here are indistinguishable from those cases where a private party has made a report or complaint to the police. Thus, plaintiff fails to create an issue of fact on this issue. Seltzer's summary judgment motion should be granted as to all the section 1983 claims brought against him.

As to the section 1985(3) claims, I consider these to have been dismissed by Judge Mosman in his August 18, 2009 Order. As noted above, Judge Mosman dismissed all of plaintiff's claims based on an equal protection theory because plaintiff failed to allege that any of the defendants acted with an intent or purpose to discriminate against plaintiff based upon his membership in a protected class. To prevail on a section 1985(3) claim, plaintiff must show class-based animus. Griffin v. Breckenridge, 403 U.S. 88, 102 (1971) (to support a cause of action arising from a private conspiracy in violation of § 1985(3), "there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action"); Caldeira v. County of Kauai, 866 F.2d 1175, 1182 (9th Cir. 1989) (claims under § 1985(3) require a showing of class-based animus). Judge Mosman's August 18, 2009 Order dismissing all of the equal protection claims because of the lack of an allegation of class-based animus, included the dismissal of the section 1985(3) claims.

Even if the section 1985(3) claims were still in the case, Seltzer states in his declaration that he has never been involved with other people in a conspiracy and that no conspiracy to violate plaintiff's rights has ever existed. Seltzer Declr. at ¶¶ 13, 18.

In response, plaintiff provides no evidence of any conspiratorial act or of any class-based animus as a motive for Seltzer's actions. Rather, plaintiff simply states that his rights were violated as alleged in his Amended Complaint and the attachments to his Amended Complaint, and that a conspiracy exists between Seltzer and the other defendants. Pltf's Declr. in Sup. of Pltf's Resp. to Seltzer's MSJ at ¶¶ 3, 4.

Conclusory allegations are insufficient to create an issue of fact. E.g., United States v. Wilson, 881 F.2d 596, 601 (9th Cir. 1989) (self-serving and conclusory declarations of fact are insufficient to raise a genuine issue of fact); Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989) (summary judgment motion cannot be defeated by relying solely on conclusory allegations unsupported by factual data). None of the attachments to plaintiff's Amended Complaint contain any facts suggesting that Seltzer acted with a class-based animus. Thus, even if the section 1985(3) claims remain in the case, plaintiff fails to create an issue of fact sufficient to sustain the claims as to Seltzer. Seltzer's motion for summary judgment should be granted as to the section 1985(3) claims against him.

Finally, as to the three supplemental tort claims brought by plaintiff against Seltzer, I recommend that summary judgment be granted to Seltzer. First, while there are limited circumstances under which a negligent infliction of emotional distress claim may be recognized in Oregon, none of them are apparent in the record here. Navarette v. Nike, Inc., No. 05-1827-AS, 2007 WL 221865, at *4 (D. Or. Jan. 26, 2007).

Second, there is no evidence in the record to support an

invasion of privacy claim against Seltzer. Finally, to prove a claim for negligence under Oregon law, plaintiff must establish the following elements:

> (1) that defendant's conduct caused a foreseeable risk of harm, (2) that the risk is to an interest of a kind that the law protects against negligent invasion, (3) that defendant's conduct was unreasonable in light of the risk, (4) that the conduct was a cause of plaintiff's harm, and (5) that plaintiff was within the class of persons and plaintiff's injury was within the general type of potential incidents and injuries that made defendant's conduct negligent.

Solberg v. Johnson, 306 Or. 484, 490-91, 760 P.2d 867, 870 (1988) (citing Fazzolari v. Portland School Dist. No. 1J, 303 Or. 1, 17-18, 734 P.2d 1326, 1336 (1987)).

Here, plaintiff's negligence claim fails because he fails to show that Seltzer's actions were the cause of any harm to plaintiff. As recited above, there are no facts in the record showing that Seltzer did anything more than complain to ODOC employees about mail he was receiving from plaintiff, and request ODOC employees to stop plaintiff from sending the mail.

Additionally, to prevail on a claim based in negligence, plaintiff must articulate that the defendant's allegedly negligent actions caused the plaintiff some type of harm, be it emotional, physical, or economic. To the extent plaintiff's negligence claim is based on emotional harm, I have already rejected that theory above. He neither alleges nor proves the existence of any physical harm.

As to economic harm, there is no apparent economic harm alleged, and importantly, given that this is a summary judgment motion, there is no evidence of economic damage in the summary judgment record. To survive Selzter's motion on this claim,

plaintiff must at least create an issue of fact as to the existence of economic harm allegedly caused by Seltzer's alleged negligence. He fails to do so.

Finally, even if there were some type of economic harm apparent in the record, "under Oregon law 'one ordinarily is not liable for negligently causing a stranger's purely economic loss without injuring his person or property' even if the harm is a foreseeable consequence of negligent conduct." Anderson v. Atlantic Recording Corp., No. CV-07-934-HU, 2010 WL 1798441, at *11 (D. Or. May 4, 2010) (quoting Onita Pac. Corp. v. Trustees of Bronson, 315 Or. 149, 159, 843 P.2d 890 (1992)); see also Vasconcellos v. Wells Fargo Home Loan Mortgage, Inc., No. CV-10-757-KI, 2010 WL 3732232, at *5 (D. Or. Sept. 20, 2010) ("in Oregon, negligent liability for purely economic harm must be predicated on some duty beyond the common law duty to exercise reasonable care to prevent foreseeable harm") (citing Oregon Steel Mills, Inc. v. Coopers & Lybrand, 336 Or. 329, 341, 83 P.3d 322 (2004)). No facts in the record support a negligence claim against Seltzer for economic harm.

I recommend that summary judgment be granted to Seltzer on plaintiff's supplemental tort claims.

III. ODOC Defendants' Motion for Summary Judgment

Defendants Hathaway, Wright, Tupou, and Hunter move for summary judgment on all of the remaining claims against them. They argue that the undisputed facts indicate that they did not violate plaintiff's constitutional rights and that they are entitled to qualified immunity. They also argue that without a waiver of sovereign immunity, any supplemental state claims must be dismissed.

A. Section 1983 Claims re: Mail Restriction

As the ODOC Defendants note, Judge Mosman previously dismissed plaintiff's access to courts claims because the right of access to the courts does not extend to filing a state tort action against a private citizen. Aug. 18, 2009 Ord. at pp. 1-2 (citing Simmons, 318 F.3d at 1160). Defendants contend that the "multitude" of plaintiff's First Amendment claims are all, in essence, access to courts claims and thus, have been dismissed by Judge Mosman.

The undisputed facts establish that the only mail plaintiff sent to Seltzer, or desired to send, was mail related to a tort case plaintiff intended to file, or had filed, against Seltzer in Deschutes County Circuit Court. Am. Compl. at ¶ 37; Pltf's Declr. in Opp. to SJ at ¶ 1 (plaintiff sent a Notice of Intent to Sue to Seltzer in December 2008), ¶ 6 (plaintiff sent a copy of the Complaint and Summons he had filed in Deschutes County Circuit Court, to Seltzer in May 2008), ¶ 14 (all the mail sent by plaintiff to Seltzer contained only legal mail and "legal mail" was written on the outside of all such mail). I agree with defendants that Judge Mosman has dismissed any "access to courts" First Amendment or Fourteenth Amendment due process claims based on the restriction of plaintiff's ability to send this mail to Seltzer. Aug. 18, 2009 Ord. at pp. 1-2; see also Dec. 8, 2008 Ord. at pp. 4-5 (dismissing the same claims on same basis); Hebbe v. Pliler, No. 07-17265, 2010 WL 4673711, at *3 (9th Cir. Nov. 19, 2010) (constitutional right to court access is "grounded in the First Amendment right to petition and the Fourteenth Amendment right to due process"). Summary judgment should be granted to the ODOC Defendants on any "access to courts" claims.

But, plaintiff appears to separately raise a free expression First Amendment claim in addition to his "access to courts" claims. That is, his Amended Complaint suggests that he contends that the outgoing mail restriction violated not only his right to access the courts, but his more general First Amendment right to express himself.

Prisoners have a First Amendment right to send and receive mail. Witherow v. Paff, 52 F.3d 264, 265 (9th Cir. 1995) (per curiam) (citing Thornburgh v. Abbott, 490 U.S. 401, 407 (1989)). "However, a prison may adopt regulations which impinge on an inmate's constitutional rights if those regulations are "reasonably related to legitimate penological interests." Id. Legitimate penological interests include "security, order, and rehabilitation." Id.

Here, while plaintiff contests the description of the mail he sent to Seltzer as threatening or harassing, there is no dispute that it was unwanted by Seltzer and that Seltzer considered the notice of plaintiff's intent to sue him, and a copy of plaintiff's state tort complaint against him, accompanied by a summons, to be harassment. There is also no dispute that Seltzer contacted the ODOC to request that the mail to him by plaintiff be stopped.

Many courts have recognized that a prison has a legitimate, penological interest in protecting the public from harassment by prohibiting an inmate from sending mail considered harassing. E.g., Berdella v. Delo, 972 F.2d 204, 209 (8th Cir. 1992) (government's interest in protecting the public from harassment by inmates justifies prohibiting an inmate from sending mail to persons who have affirmatively requested that mail not be received

from an inmate); Jones v. Diamond, 594 F.2d 997, 1014 (5th Cir. 1979) (validating the use of negative mail lists and stating "jail officials may employ a 'negative mail list' to eliminate any prisoner correspondence with those on the outside who affirmatively indicate that they do not wish to receive correspondence from a particular prisoner"); Tompkins v. Department of Corrections, No. 1:08CV322-01-MU, 2009 WL 995573, at *1 (W.D.N.C. Apr. 14, 2009) (prison had legitimate penological interest in protecting the public from harassment by inmates by prohibiting an inmate from sending letters to persons who requested that they do not wish to receive mail from a particular inmate).

Additionally, the evidence in the record indicates that the restriction was no broader than necessary to protect Selzter because plaintiff had no limits on his ability to mail his state tort complaint directly to the Deschutes County Circuit Court or to communicate directly with a private process server or the Sheriff. The only restriction was on mail to Seltzer.

Plaintiff's subjective opinion that the mail was not threatening or harassing is irrelevant in light of Seltzer's request that the mail be stopped. Clearly, Seltzer concluded that being named a defendant by plaintiff in a state tort lawsuit was a form of harassment. Moreover, according to the undisputed facts in the summary judgment record, although Seltzer was not the victim of plaintiff's burglary crime for which Seltzer states plaintiff was convicted, plaintiff appears to have taken advantage of Seltzer's offer of housing, making Selzter a victim of plaintiff's in a sense, and providing a basis for Seltzer's conclusion that the mail from plaintiff was harassing.

Finally, plaintiff complains that ODOC officials acted inappropriately because the OAR requires Seltzer to have filed a written complaint and the summary judgment record fails to establish that Seltzer ever contacted the ODOC Defendants in writing. I agree with plaintiff regarding the evidence in the record, but, a violation of a state regulation does not provide a basis for a section 1983 claim. Moreland v. Las Vegas Metro. Police Dep't, 159 F.3d 365, 371 (9th Cir. 1998) (state law violations do not, on their own, give rise to liability under section 1983); Lovell v. Poway Unified Sch. Dist., 90 F.3d 367, 370-71 (9th Cir. 1996) ("Section 1983 limits a federal court's analysis to the deprivation of rights secured by the federal "'Constitution and laws'"). Here, the First Amendment does not require that the mail restriction be initiated by Seltzer in writing. It is enough that Seltzer contacted the ODOC employees to request that the mail to him be stopped.

I recommend that summary judgment be granted to the ODOC Defendants on all of plaintiff's claims challenging the mail restriction order, whether based on an access to courts theory or a free expression theory.

B. Section 1985(3) Claims

As with the section 1985(3) claims against Seltzer, plaintiff's section 1985(3) claims against the ODOC Defendants require a showing of class-based animus. As explained above, I consider these claims to be out of the case as a result of Judge Mosman's August 18, 2009 Order dismissing all claims based on an equal protection theory because plaintiff failed to allege that any of the defendants acted with an intent or purpose to discriminate

against plaintiff based upon his membership in a protected class.

Even if the section 1985(3) claims remain in the case, the ODOC Defendants are entitled to summary judgment on those claims because plaintiff fails to create an issue of fact as to the existence of a conspiracy or his membership in a protected class.

In his declaration, Hathaway states that he issued the mail restriction to plaintiff because Seltzer contacted the facility and provided sufficient information to justify the restriction. Hathaway Declr. at ¶¶ 4, 8. Hathaway expressly states that he was not coerced into issuing the restriction as plaintiff alleges in his Amended Complaint. Id. at ¶ 8. Wright never actually issued a mail restriction. Hatfield, not a named defendant, states that she issued an outgoing mail restriction to plaintiff based on Seltzer's contact with ODOC and his provision of sufficient information to justify the restriction. Hatfield Declr. at ¶¶ 4, 8. Hatfield also expressly states that she was not coerced into issuing the restriction as plaintiff alleges in his Amended Complaint. Id. at ¶ 8.

In response, plaintiff submits a declaration (docket #64) in which he makes no statements regarding any efforts by the ODOC Defendants to conspire with Seltzer, or each other, to restrict his outgoing mail to Seltzer. Plaintiff states that Seltzer called Hathaway, Wright, Tupou, and/or other defendants in an effort to get them to frustrate plaintiff's efforts to continue legal action against Seltzer. Pltf's Declr. in Opp. to ODOC Defts' SJ Mtn at ¶ 8. He further states that the these individuals issued the outgoing mail restriction on the basis of Setlzer's calls to them. Id. at ¶ 11. He alleges that defendants never objectively verified

that the mail plaintiff was sending was threatening or harassing mail because Seltzer never actually sent defendants photocopies of the mail. Id. at ¶¶ 12, 13. But, he also acknowledges that he wrote "legal mail" on the outside of the mail he sent to Seltzer and that Hathaway, Tupou, Wright, and Hatfield all knew that it was legal mail. Id. at ¶ 15.

Plaintiff fails to explain how he has personal knowledge of why Seltzer called defendants, or why defendants acted the way they did. Furthermore, these statements do not show that any of the defendants conspired with each other to issue the outgoing mail restriction. Although Seltzer complained to ODOC employees about the mail he received, plaintiff's statements reveal no collusion, discussion, plan, agreement, or any other acts taken by any of the defendants in furtherance of an alleged conspiracy. Additionally, plaintiff offers no other affidavits, declarations, or documentary evidence containing any such facts. Thus, plaintiff's section 1985(3) claim initially fails because of his failure to create an issue of fact regarding a conspiracy. United Broth. of Carpenters and Joiners of Am. v. Scott, 463 U.S. 825, 828-29 (1983) (first element that must be alleged and proved in support of a claim under section 1985 is a conspiracy); Scott v. Ross, 140 F.3d 1275, 1284 (9th Cir. 1998) (to establish a § 1985(3) conspiracy claim, the plaintiff must show: "[1] the existence of a conspiracy to deprive the plaintiff of the equal protection of the laws; [2] an act in furtherance of the conspiracy; and [3] a resulting injury.").

In addition to the element of conspiracy, plaintiff must show that defendants were motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the

conspirators' action." Griffin, 403 U.S. at 102. Plaintiff's declaration does contain some statements regarding plaintiff's alleged mental and physical disabilities. He states that his ODOC medical records show that he is mentally and physically disabled. Pltf's Declr. at ¶ 34. He further states that "[t]hrough my interactions, conversations, and associations with Defendants, it is my belief that Defendants acted as I described in my Complaints (e.g. retaliation, discrimination, interfering with my constitutional rights) due to my physical and mental disabilities[.]" Id. at ¶ 35. He also asserts that defendants acted due to his "institutionalization, socioeconomic status, lack of education and wealth, being a prisoner and a practitioner of the religion of Buddhism." Id.

Other than religion, none of the attributes or conditions plaintiff ascribes to himself is a protected class for purposes of section 1985(3), including physical and mental disabilities. Chasse v. Humphreys, No. CV-07-189-HU, 2008 WL 4846208, at *3-5 (D. Or. Nov. 3, 2008) (disability not a protected class for section 1985(3)).

Whether First Amendment religious rights are protected under section 1985(3) appears to be an open question in the Ninth Circuit. Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517, 524 * n.8 (9th Cir. 1994) (refusing to decide if Establishment Clause protected by section 1985(3) and citing decisions from other courts both recognizing freedom of religion as a basis for section 1985(3) claims, and refusing to recognize such a claim); Scott v. Rosenberg, 702 F.2d 1263, 1269 (9th Cir. 1983) (recognizing possibility there might be a claim based on a conspiracy to violate

a protected right of freedom of religion, but not deciding the question).

Assuming for the purposes of this decision only that the Ninth Circuit would recognize such a claim, plaintiff offers nothing but his conclusory self-serving declaration that he practices the Buddhist religion, and more importantly, he offers no statements or other evidence suggesting that any of the defendants knew of his religious beliefs or issued the outgoing mail restriction based on those religious beliefs. Thus, plaintiff fails to create a material issue of fact regarding the class-based animus required to sustain his section 1985(3) claim.

The ODOC Defendants' motion on the section 1985(3) claims should be granted.

C. Retaliation Claim

Plaintiff alleges that his transfer to OSCI on June 25, 2008, was in retaliation for plaintiff's exercise of his First Amendment right to send mail. As I understand his claim, he contends that in retaliation for sending mail to Seltzer, the ODOC Defendants transferred him from a minimum security prison to a medium security prison.

In the Ninth Circuit, the assertion of a viable First Amendment retaliation claim requires five elements: (1) an assertion that a state actor took some adverse action against an inmate (2) because of (3) that inmate's protected conduct, and that such action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal. Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005).

Plaintiff appears to bring this claim only against Wright, although that is not entirely clear from his Amended Complaint or his response to the summary judgment motion. Regardless, the ODOC Defendants contend that even if plaintiff asserts a legitimate protected activity, which the ODOC Defendants do not concede, his claim fails because he cannot show that the prison officials' decision to transfer him was for an improper, retaliatory purpose. That is, he cannot demonstrate that the ODOC Defendants' actions did not advance legitimate goals or were not properly tailored to achieve those goals.

The ODOC Defendants contend that plaintiff was transferred because of his need to meet with a BHS specialist to renew and receive anxiety medication. Wright Declr. at ¶ 8. Because these needs could not be met at OSPM, he was transferred to OSCI. Id. Additionally, Wright states that OSCI is a pre-release facility, making it appropriate for plaintiff who had less than four years to his release date. Id. at ¶ 9. And, OSCI also has a law library where plaintiff could pursue his legal work. Id. at ¶ 10. Transferring plaintiff to OSP was not an option because of a conflict with another person at that facility. Id.

Based on these statements in Wright's declaration, the ODOC Defendants argue that plaintiff cannot show that the move was done for a retaliatory purpose. Addressing an inmate's medical need is a valid penological reason to transfer an inmate from one facility to another and thus, they argue, plaintiff cannot succeed on this claim.

In response, plaintiff denies that he ever asked Wright for help with mental health issues. Pltf's Declr. at ¶ 16. He states

that at all times relevant to this action, he was not prescribed narcotic medication for anxiety. Id. at ¶¶ 33, 42. He further states that Wright told plaintiff that if plaintiff did not drop his civil action against Seltzer, Wright was going to punish him. Id. at ¶ 18; see also Id. at ¶ 21 (Wright threatened to punish me if I continued to send Seltzer legal mail and if I did not cease my litigation against Seltzer).

Additionally, plaintiff states that Wright's statement regarding plaintiff having a conflict with a person at OSP, is not true. Id. at ¶ 22. As support for this statement, plaintiff states that inmate conflicts are documented on "AS400," part of the ODOC computer system. Id. at ¶ 23. He states that the only conflict for plaintiff in the AS400 at the relevant time was with inmate Steve Tryon at SRCI. Id. Finally, plaintiff notes that the timing of Wright's transferring plaintiff to OSCI suggests retaliation and punishment for plaintiff's continuing to send legal mail and litigating against Seltzer.

In reply, the ODOC Defendants argue that plaintiff has failed to create a material issue of fact on the issue of whether defendants would have reached the decision to transfer plaintiff in the absence of his protected conduct. Defts' Reply at pp. 5-6. The ODOC Defendants contend that plaintiff proffers nothing to suggest that Wright transferred him because he engaged in protected conduct and that the action did not advance a legitimate correctional goal. Thus, they contend, plaintiff fails to meet his burden of sustaining this claim.

I disagree. Wright offers three reasons for the transfer which, if proven, would meet the standard of advancing a legitimate

penological goal: (1) access to needed medical services; (2) preparation for release; and (3) access to a law library. In addition, he states that a transfer to OSP was not an option because of a conflict. In support of his statements, Wright submits no documentation of plaintiff's alleged mental health issues, no documentation of his request to see a BHS specialist, and no documentation of the type of medication plaintiff was taking.[2] Plaintiff describes that requests for appointments with BHS specialists are made by written kyte. Wright states that plaintiff made the request to see one; plaintiff states he did not. This is a classic conflict of evidence that cannot be resolved on summary judgment. Additionally, Wright fails to explain how plaintiff, who had been housed in OSPM for at least four months prior to his transfer, had been able to receive a prescription for the medication that OSPM staff allegedly cannot prescribe and which plaintiff was requesting be renewed.

Wright further fails to support his statement that the transfer was appropriate because OSCI is a pre-release facility and plaintiff had fewer than four years left on his sentence. Wright submits no ODOC policy explaining any type of pre-release transfer authorized by ODOC. He describes no established practice that

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[2] Wright submits a copy of the transfer authorization. Attchmt 2 to Wright Declr. It is dated June 21, 2010. The entry for "Type/Reason" states "TRAN MEDI." No explanation of the abbreviations is given. Even assuming "MEDI" means medical, this does not, by itself, negate plaintiff's testimony that Wright allegedly told plaintiff he would punish him for his continued mail and litigation against Seltzer, and it does not explain, without more, the basis behind any medically-related transfer and why it was justified.

would suggest that an inmate with between three and four years on a sentence is considered appropriate for transfer to a pre-release facility.

Additionally, as to the law library, while Wright states that OSCI had a law library allowing plaintiff to pursue his legal work, he does not state that OSPM lacks one. Furthermore, while Wright offers a reason why plaintiff could not be transferred to OSP, this does not explain why a transfer was justified in the first place, and, plaintiff creates an issue of fact regarding Wright's statements because, as plaintiff states, he had no conflicts with anyone at OSP at the time, and Wright fails to submit any record showing plaintiff's conflicts which plaintiff says should be available in the ODOC computer system. Finally, the ODOC Defendants fail to even address plaintiff's allegations that Wright threatened him with punishment for sending mail to Seltzer.

Plaintiff's declaration creates an issue of fact as to Wright's motive, sufficient to defeat the ODOC Defendants' summary judgment motion on this claim. Because the ODOC Defendants make no argument on the other elements of the claim, I do not consider them. It should be clear, however, from the discussion above, that contrary to the ODOC Defendants' assertion, plaintiff does have a First Amendment right to send mail to Seltzer and this is a sufficient basis upon which plaintiff may base this claim. While the outgoing mail restriction did not infringe his First Amendment rights, he nonetheless may not be retaliated against for his attempts to exercise his rights. See Pratt v. Rowland, 65 F.3d 802, 807 (9th Cir. 1995) (while a prisoner has no constitutionally protected liberty interest in being held in a given facility, the

prisoner nonetheless possesses the right not to be transferred in retaliation for his exercise of protected First Amendment rights).

Furthermore, the ODOC Defendants are not entitled to qualified immunity on the retaliation claim. "'[T]he prohibition against retaliatory punishment is clearly established law in the Ninth Circuit, for qualified immunity purposes.'" Rhodes, 408 F.3d at 569 (quoting Pratt, 65 F.3d at 806).

D. State Law Claims

The Oregon Tort Claims Act (OTCA) provides that the sole cause of action for any tort of officers, employees, or agents of a public body acting within the scope of their employment or duties, shall be an action against the public body only. Or. Rev. Stat. § (O.R.S.) 30.265. No other form of civil action or suit is allowed. In an action against a state employee, the state is substituted as the only defendant. Id.

"The Eleventh Amendment bars suits against a state or its agencies, regardless of the relief sought, unless the state unequivocally consents to a waiver of its immunity." Yakama Indian Nation v. State of Wash. Dep't of Revenue, 176 F.3d 1241, 1245 (9th Cir. 1999). "Although the State of Oregon has consented to be sued in Oregon courts for the torts committed by its employees, officers, or agents while acting within the course and scope of their employment under the OTCA, it has not consented to be sued in federal courts for those torts." Blair v. Toran, No. CV-99-956-ST, 1999 WL 1270802, at *23 (D. Or. Dec. 2, 1999), aff'd, No. 00-35035, 12 Fed. Appx. 604 (9th Cir. June 25, 2001).

Based on the Eleventh Amendment, all of plaintiff's state claims against the individually named ODOC Defendants are barred

because, as above, under the OTCA, the State of Oregon is substituted as the proper defendant in those claims and plaintiff may not sue the State of Oregon in federal court.

Additionally, to the extent plaintiff attempts to bring claims directly under the Oregon Constitution, such claims should be dismissed because plaintiff has no private right of action directly under the Oregon constitution. Hunter v. City of Eugene, 309 Or. 298, 303-04, 787 P.2d 881, 883-84 (1990).

The ODOC Defendants' motion as to the state claims should be granted.

E. Statements Regarding Discovery & Procedural History

In his declaration filed in response to the ODOC Defendants' summary judgment motion, plaintiff makes several assertions regarding his inability to conduct full discovery and the "inadequate" time allowed to conduct discovery given that the case was filed less than one year before defendants' motion for summary judgment was filed. Pltf's Declr. at ¶¶ 31, 39. Plaintiff also asserts that the ODOC Defendants did not serve him with an Answer to his original Complaint or his Amended Complaint. Id. at ¶¶ 30, 40.

The docket shows that on December 5, 2008, Judge Mosman dismissed plaintiff's original Complaint before it was served. The ODOC Defendants were thus not obligated to file an Answer. Plaintiff filed his Amended Complaint on June 23, 2009, and service on the ODOC Defendants was waived on September 21, 2009 (docket #19), following Judge Mosman's August 18, 2009 Order dismissing some claims and one ODOC Defendant, and authorizing service on the remaining defendants. The ODOC Defendants filed an Answer on

October 12, 2009 (docket #20). The Certificate of Service appended to the Answer shows service on plaintiff by mail at OSCI on October 12, 2009 (docket #25). On October 29, 2009, the Court received a notice from plaintiff, dated October 20, 2009, of a change of address to a street address in Portland upon his release from prison (docket #26). Thus, the ODOC Defendants properly sent a copy of their Answer to plaintiff at OSCI, plaintiff's address on record in this litigation at the time the Answer was mailed.

As to the argument that plaintiff has been unable to engage in discovery, I note that the case was originally filed in 2008, and after the initial dismissal in December 2008, plaintiff did not file an Amended Complaint until late June 2009. The ODOC Defendants timely filed their Answer in October 2009 after waiving service.

The Court then issued a Scheduling Order on November 30, 2009 (docket #28). The Order allowed sixty days for the completion of discovery and to file dispositive motions. Notably, at this time, plaintiff was not incarcerated. A subsequent Scheduling Order, dated January 29, 2010, extended the discovery deadline to April 2, 2010 (docket #34). Thus, plaintiff had more than nine months from the time his Amended Complaint was filed in June 2009, had more than seven months from Judge Mosman's August 18, 2009 Order allowing part of plaintiff's action to proceed, and had more than six months from the time the ODOC Defendants waived service on September 21, 2009, in which to conduct discovery. Importantly, the record shows that plaintiff was not incarcerated from mid-October 2009 to sometime in February 2010, Pltf's Declr. at ¶ 31, negating plaintiff's argument that the prison setting was an

impediment to conducting discovery during the discovery period.

Additionally, the docket shows that the ODOC Defendants sought, and were granted, an extension of time to file dispositive motions up to July 2, 2010. During this time, plaintiff never notified the Court in any manner of any problems he had encountered in obtaining discovery. In his motion for extension of time to respond to the ODOC Defendants' summary judgment motion (docket #53), plaintiff cited a delay in receiving the motion and limited access to the prison law library as the basis for the motion, but did not mention any discovery issues.

As the recitation of the history of this case shows, plaintiff's assertions regarding an inability to conduct discovery are unfounded.

CONCLUSION

Seltzer's motion for summary judgment [46] should be granted in its entirety. The ODOC Defendants' motion for summary judgment [80] should be granted except as to plaintiff's First Amendment retaliation claim.

SCHEDULING ORDER

The Findings and Recommendation will be referred to a district judge. Objections, if any, are due February 7, 2011. If no objections are filed, then the Findings and Recommendation will go under advisement on that date.

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If objections are filed, then a response is due February 24, 2011. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

IT IS SO ORDERED.

Dated this 18th day of January, 2011.

/s/ Dennis J. Hubel

Dennis James Hubel
United States Magistrate Judge